NO. 2856

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR VON ARX

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE DISTRICT COURT OF ALASKA, DIVISION NUMBER ONE

CHENEY and ZIEGLER,

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STATEMENT OF THE CASE

Counsel for the plaintiff has stated the case in his brief. His statement is not supported by the record therefore we feel compelled to make our own statement of what we contend the record shows.

We will refer to the Plantiff in Error as Plaintiff and Defendants in Error as Defendants.

Plaintiff was a citizen of Douglas City, Alaska. Defendant W. A. Shafer was City Marshal and John Henson was City Magistrate. Plaintiff brought this action to recover damages from defendants alleging, among other things, that defendants entered into a conspiracy to injure plaintiff; that pursuant to such conspiracy Shafer went to plaintiff's house without a warrant and without official or other business of any kind. That he assaulted plaintiff with a revolver, and without any legal right to do so arrested plaintiff and confined him in the City Jail; that the arrest was made at eleven o'clock in the forenoon and the plaintiff was not taken before the magistrate before noon the next day. That plaintiff was refused bail; that the jail where the plaintiff was

confined was foul, dirty, ill kept and swarming with vermin; that plaintiff tendered bail which was refused: for all of which plaintiff prayed judgment in the sum of $1,000 and for exemplary damages in the sum of $1,000.

Defendants answered admitting their official positions and the arrest of the plaintiff; denied all the remaining allegations of the complainant and, as an affirmative defense, alleged that plaintiff had committed a misdemeanor in violation of Sec. 15, Ord. 39 of the City of Douglas by then and there using profane and obscene language on the street; that the crime was committed in view of the defendant Shafer, who was the officer making the arrest; that defendant Shafer placed plaintiff in the City Jail where he remained until ten o'clock the following morning when he was taken before the city magistrate, was tried and found guilty of the crime of using profane and obscene language in the public street.

Plaintiff replied to defendants' answer by restating his whole case and admitting the trial and judgment of conviction.

Upon these pleadings the case was tried; at the close of plaintiff's case the Court granted a nonsuit as to defendant Henson, and, at the close of all

the evidence the Court granted a motion for a directed verdict in favor of the defendant Shafer. Plaintiff sued out this writ of error to reverse the rulings of the trial court.

That the court was right in granting the nonsuit as to defendant Henson, the City Magistrate, is so apparent from the record that we will not take the time of this court in discussing the question in our brief, but will base our statement of facts upon all the evidence in the case.

The evidence shows that the plaintiff owned a house in Douglas City which had been occupied by one Hunsucker for the past eight years; that on or about December 11, 1914, Hunsucker killed his wife and another man and then went into the house, locked the door and killed himself. The Coroner went to the house in company with the U. S. Marshal and the City Marshal (the defendant Shafer), secured a jury, held an inquest, removed the remains, locked up the house and left it in charge of the U. S. Marshal. The U. S. Marshal turned the custody of the house over to Shafer, the City Marshal, with instructions to open the house when requested to do so by the brother of the deceased. The brother of the deceased came to Douglas and requested the City Marshal to go with him to the

house to examine the effects of the deceased. The house was locked and plaintiff was called to assist in opening the door. Plaintiff was standing in the door, defendant Shafer was standing on the sidewalk when plaintiff called him a G—D—S—of—B and other vile and obscene names. A large crowd of citizens gathered. Plaintiff struck defendant Shafer, knocking him down in the muddy street. Plaintiff was pulled off by the bystanders. Defendant Shafer then arrested plaintiff and took him to the City Jail. This was about one o'clock P. M. Plaintiff was arrested in the Indian Village in what is known as the Beach, located quite a distance from the jail. in going up town they reached the jail first. That is, to say the jail was one hundred and fifty feet nearer to the Indian Village than was the magistrate's office. Defendant Shafer left plaintiff at the jail and went to his home, which was in the opposite part of the city, quite a long distance away. The officer washed up, changed his clothing, ate his lunch which he had left untouched at noon time, took his dirty uniform to the cleaners. It was then about two o'clock in the afternoon. The officer then went back to the Beach where he had made the arrest, to search for some of the persons who were present and had witnessed the affray. At four o'clock he re-

turned and went to the office of the magistrate to file complaint against the plaintiff. John Henson, the magistrate, was not in his office and did not return to his office again that afternoon. The magistrate was ill in the afternoon and had gone to his own home. The defendant Shafer provided the plaintiff with a bed in the jail and provided him with drinking water. Defendant's evidence also shows that he provided plaintiff with sufficient food. This is disputed by the plaintiff. At ten o'clock the following morning defendant Shafer took plaintiff to the office of the magistrate and lodged a complaint against him. Plaintiff stated that he was not ready for trial but asked for a continuance until his attorney should arrive. The continuance was granted until one o'clock, at which time plaintiff was again brought into court, was tried and convicted.

The evidence further showed that it was the custom of the city magistrate to be at his office from nine o'clock until five o'clock but that the magistrate was engaged in other business which occupied his attention in the afternoons. That it was the custom of the magistrate to hear Criminal cases in the forenoons.

ARGUMENT

In our view of the case the only question for determination upon this writ of error is this: Is there sufficient evidence to go to the jury upon the question as to whether or not the defendant Shafer was justified in keeping plaintiff confined in the jail from one o'clock in the afternoon until ten o'clock in the morning of the next day.

Before discussing the cases cited by counsel on page seven of his Brief we desire to direct attention to Sec. 2389 of the Compiled Laws of Alaska, reading as follows: "That the defendant must in all cases be taken before the magistrate without delay," and to the fact that this section is found in our code under the title, "Of the warrant of arrest," being chapter thirty-two of the Compiled Laws. The whole chapter deals with the procedure where a complaint is made to the magistrate and a warrant issued. In State vs. Belding, 71, Pac. 330, the Supreme Court of Oregon construed Sec. 2389 as being not mandatory but directory only. The instant case does not come under chapter thirty-two entitled, "Of the warrant of arrest." The chapter in which Sec. 2389 is found is not the procedure applicable

to the case at bar. This case comes under chapter thirty-three of the Compiled Laws entitled, "Of the arrest, how and by whom made." Sec. 2390 of Chapter thirty-three provides, "That arrest is the taking of a person into custody that he may be held to answer for a crime." Sec. 2391, "That the arrest may be made either,

1st. By peace officer under warrant,
2nd. By peace officer without a warrant.
3rd. By a private person."

Sec. 2404 provides, "That a private person may arrest for a cause specified in Sec. 2329 of this title in like manner and with like effect as a peace officer without a warrant." Sec. 2405, "That a private person who has arrested another for the commission of a crime must without unnecessary delay take him before a magistrate or deliver him to a peace officer."

There being no express provision as to what shall be done in case an officer arrests a person without a warrant it would seem that Sec. 2405 would apply to such a case instead of Sec. 2389. In other words we contend that an officer arresting without a warrant is required to take the person arrested before a magistrate without unnecessary delay.

The only cases cited by counsel are from Indi-

ana, Mass., and Ohio. Taking up the cases in the order found on page seven of Counsel's Brief, we find that none of the cases cited are exactly in point.

Low vs. Evans, 16, Ind. 486.

This case arose in Lafayette, Indiana, tried May term, 1861, Supreme Court of Indiana.

Low sued Evans for false imprisonment and averred that without lawful authority he seized the plaintiff, took from him $15.00, his tobacco, penknife and handkerchief, and caused him to be confined in jail twelve hours. Defendant answered, setting up that he was City Marshal, and as such, on view arrested plaintiff for violating city ordinances, also alleged that he arrested the defendant on Sunday; that the city court was not in session; that he put him in jail intending to bring him before the mayor on the following day but released him on promises that he would appear; that he afterwards appeared, plead guilty and was fined. There was a demurrer to the answer. The Court say:

> "It will be observed that the statute speaks of penalties and forfeitures in connection with the violation of by-laws and ordinances of the city, while the ordinances passed by the city of Lafayette prescribe fines, nevertheless the form pursued in recovering the same is in the nature

of a suit for the recovery of a penalty or forfeiture. We are referred to the case of Van Deever vs. Mattox, 3 Ind., 479, but the difference between that case and the case at bar is that there Van Deever was arrested by Mattox, a constable, for disturbing a religious society in his view; for being guilty of a misdemeanor forbidden by statute and for which he was liable for prosecution in the name of the state. In this case there is no statute making drunkenness a crime or misdemeanor. The act was an offense against the city ordinances for which the statute prescribes that a forfeiture or penalty might be recovered in suit of law.

"We are at a loss to see any authority for thus imprisoning a man for an uncertain time because he may be subject to a penalty to be recovered by an action in the nature of an action of debt; the demurrer should have been sustained."

In Van Deever vs. Mattox. The Court say:—

"We think the demurrer to the plea was correctly overruled. A constable has authority as a conservator of the peace to arrest a person for a breach of the peace committed within his view and to detain the offender for a reasonable time for the purpose of taking him before a magistrate. The circumstances stated in the

plea fully justify the detention for the rest of the time stated. Judgment was affirmed with costs."

In the above case the constable arrested plaintiff for disturbing a religious meeting, placed him in jail for one and a half hours.

Stewart vs. Feeley, 118 Ind.

This case was reversed in the Supreme Court solely upon the grounds of erroneous instructions given by the trial court. The facts show that the officer made an arrest without a warrant and afterwards discharged the defendant without having taken him before a magistrate. The court holds that in such a case the officer becomes a trespasser abinito. All of the decisions are to this effect. An officer is not permitted to arrest a man without a warrant and then discharge him without taking him before a magistrate. It is the officer's duty to take the arrested person before a magistrate in all cases, but when the officer has performed that duty, provided he is justified in making the arrest in the first instance, his duty has been fulfilled and he is not liable.

Brock vs. Stimson 108, Mass. 420.

This case was decided by the Supreme Court of

Mass., in November, 1871. It arose at Cambridge. Action for assault and battery and false imprisonment. Defendant pleaded that he arrested plaintiff for being drunk and disorderly and detained him a short time in prison. Plaintiff recovered verdict for $300.00. The evidence showed that the plaintiff was arrested without a warrant and that the defendant after detaining him in custody for the space of one hour, released him therefrom and took no further proceedings in the premises.

In this decision the court used the following language:

> "The defendant as his bill of exceptions and his own answer both show, having failed to do this (taking the arrested person before the magistrate) cannot justify the arrest, and, his unauthorized discharge of the prisoner affords him no protection from liability in this action."

Harness vs. Steele, 159 Ind.

This case was one where the defendant arrested a boy fourteen years old without a warrant for the supposed theft of a watch and detained him in jail without taking any steps to file complaint against him.

The Indiana statute provided that the detention should only continue until a legal warrant can be obtained.

It is true the court in its opinion used this language: "An officer arresting without a warrant cannot justify his action in holding or detaining the prisoner for an UNREASONABLE time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused." In the case at bar the officer did not need to investigate the case to determine whether a crime had been committed, he was painfully aware of the fact, and his journey to the place of arrest in an attempt to procure the witnesses was intended to facilitate the trial of the plaintiff instead of delaying it.

Lager vs. Warren, 62, Ohio St.

The facts in this case show that plaintiff was arrested at his home by three policemen, taken to jail and kept there from Jan.. 19th to Jan. 25th; plaintiff was detained in custody for more than five days without any warrant for his arrest and without any charge having been made against him and without opportunity for trial. After five days he was discharged from prison. The facts were not dis-

puted. He recovered $1,000 damages. The court used the following language, "Not having pursued their authority to arrest without a warrant by failing to obtain within a reasonable time a writ or order for the plaintiff's detention, the defendants placed themselves in the same situation as if they had acted originally without authority. It is a familiar rule that one who abuses an authority given him by law becomes a trespasser ab-initio. That rule has often been applied in cases like the present one." The case of Brock vs. Stimson, 108, Mass., was cited in the above case. Further it appeared that the revised statutes of Ohio provided that the prisoner could not be detained under such circumstances to exceed four days. The detention exceeded five days. That fact alone made out a case for the plaintiff.

A careful reading of the authorities cited by counsel shows that they are not on all fours with the case at bar.

Conceding that it was the duty of the defendant Shafer to take the plaintiff before the magistrate without unnecessary delay the question arises as to whether or not the evidence offered by the defendants was sufficient justification for the delay which occurred. The undisputed evidence shows

that the defendant was justified in making the arrest. It further shows that he was assaulted and beaten by the plaintiff; that he was knocked down in the muddy street; that his clothes were soiled so badly that it was necessary for him to take them to the cleaners. After taking his clothes to the cleaners, defendant Shafer went immediately to the Beach to find the persons who had witnessed the fight between plaintiff and defendant. It was then about two o'clock in the afternoon. As soon as defendant returned to town he went to the office of the magistrate for the purpose of filing a complaint against defendant. It was then about four o'clock. The magistrate was not at his office, but had been taken ill and had gone to his home. He did not return to his office that afternoon.

The only delay which could possibly be called unnecessary or unreasonable was the two hours occupied by Shafer in making the trip to the Beach in search of witnesses. It is a well known fact that the average citizen dislikes to be subpoenaed as a witness to a street brawl. The record also shows that the persons who witnessed the affray were nearly all Indians or foreigners. The officer, no doubt thought that unless he secured the witnesses that day he might not be able to locate them there-

after. There is nothing to indicate that the defendant was guilty of anything more than an error of judgment.

We respectfully submit that the rulings of the trial court should be affirmed.

CHENEY & ZIEGLER,
Attorneys for Defendants in Error.